SUPREME COURT OF KENTUCKY
FILE NOS. 2013-SC-149 & 2013-SC-818

COMMONWEALTH OF KENTUCKY — APPELLANT/ CROSS APPELLEE

VS.

ON DISCRETIONARY REVIEW FROM
COURT OF APPEALS
CASE NO. 2010-CA-001971

ON APPEAL FROM MADISON CIRCUIT COURT
HON. JEAN CHENAULT LOGUE, JUDGE
INDICTMENT NO. 01-CR-110

CHRISTOPHER McGORMAN, JR. — APPELLEE/ CROSS APPELLANT

BRIEF FOR APPELLEE/CROSS APPELLANT

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of this Brief for Appellee/Cross-Appellant has been mailed via first-class postage prepaid to Hon. Jean C. Logue, Madison County Courthouse, 101 W. Main St., Richmond, Kentucky 40475; Hon. David Smith, Madison County Commonwealth Attorney, P. O. Box 717, Richmond, Kentucky 40476-0717; Hon. Todd D. Ferguson, Assistant Attorney General, Criminal Appellate Division, 1024 Capital Center Drive, Frankfort, Kentucky 40601-8204, and by registered mail to Hon. Susan Stokley Clary, Clerk, Supreme Court of Kentucky, 700 Capital Avenue, Frankfort, Kentucky 40601-3488; all on this 5th day of September, 2014. I further certify that the record on appeal was not checked out from the Clerk of this Court.

Meggan Smith
MEGGAN SMITH

INTRODUCTION

This is an appeal from the Court of Appeals Opinion reversing the Madison Circuit Court's Orders of July 14, 2009, August 17, 2010, and September 27, 2010, denying Christopher McGorman, Jr.'s RCr 11.42 and CR 60.02 motions. See Appendix 1, Court of Appeals Opinion Reversing and Remanding, November 16, 2012; Appendix 2, Madison Circuit Court July 14, 2009 order, T.R. PC Vol. III, 387-413; Appendix 3 Madison Circuit Court August 17, 2010 order, T.R. PC Vol IV, 542-546; and Appendix 4 Madison Circuit Court September 27, 2010 order, T.R. PC Vol. V, 675-676. Christopher McGorman, Jr. was denied effective assistance of counsel when his counsel advised his 14-year-old client to confess to murder, failed to convey a 20-year plea offer to him, failed to request a contemporaneous competency evaluation when C.J. decompensated during trial, waived C.J.'s presence at trial, failed to object to inadmissible evidence, and failed to object to improper prosecutorial argument. C.J.'s rights were also violated by the improper procedure used to transfer his case to Circuit Court.

STATEMENT CONCERNING ORAL ARGUMENTS

Appellee/Cross-Appellant requests oral argument regarding all the issues due to their factual and legal complexity.

CITATIONS TO THE RECORD

The record contains three (3) volumes of trial record and five (5) volumes of post-conviction record. The following symbols will be used to refer to the relevant volumes:

T.R. - Trial record

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STATEMENT OF THE CASE

On January 29, 2000, Larry Raney, a schoolmate of Christopher (C.J.) McGorman, was found shot to death in a barn in rural Clark County, Kentucky. The barn was located behind the home of Mr. and Mrs. Christopher McGorman, Sr., and their 14 year old son C.J.

The police conducted an investigation which culminated in a confession by C.J. at the police station a mere eight (8) days after Raney was killed. During this statement, defense counsel, Hon. Alex Rowady, sat idly while C.J. made incriminating statements. Counsel did not take any action to ascertain the mental health status of his 14 year old client before allowing him to confess. Nor did counsel investigate the case before advising him to incriminate himself; he had not even received discovery. Inexplicably, counsel did not talk to the Commonwealth Attorney before having his client confess to ensure that any statements would be inadmissible against C.J. as part of plea negotiations. C.J. was indicted for Murder, Burglary in the first degree, and Defacing a firearm. T.R. Vol. I, 36-37.

The Commonwealth spends considerable space detailing and discussing the evidence that McGorman shot and killed Larry. Commonwealth's Brief, p. 1-4. However, this case has never been a "whodunit." What was disputed at trial was what C.J.'s mental state was at the time he killed Larry. At trial, an expert originally retained by the Commonwealth testified that C.J. was not criminally responsible because of mental illness. That mental illness is what trial counsel should have considered and investigated before advising his 14-year-old client to give a videotaped confession to police a mere eight days after the crime.

At the evidentiary hearing on C.J.'s RCr 11.42 and CR 60.02 motions, Rowady testified regarding his decision to allow his 14-year-old client to give a statement to the police a mere eight days into the investigation. Rowady testified to the following facts:

- The only people present when C.J. gave his statement on February 6, 2000,[1] were Hon. Rowady, C.J., and Detective Horton of the Clark County Sheriff's Department. V.R. 12/7/09, 9:33:00-33:16.
- Before C.J. made his statement, Rowady did not discuss with Det. Horton having anyone from the Commonwealth Attorney's office present when C.J. made the statement. Id. at 9:38:10-:15
- Before C.J. gave his statement, Rowady had not received discovery materials from the Commonwealth, only the standard documents from the detention hearing and oral updates from Det. Horton. Id. at 9:38:20-9:40:47.
- Before he allowed C.J. to give a statement, Rowady did not tender anything in writing to the Commonwealth Attorney. Id. at 9:40:55-9:41:15.
- There was no agreement as to what would be discussed in the statement. Id. at 9:41:15-:29.
- Rowady believed that an assistant Commonwealth Attorney was present at the detention hearing held mid-week between the crime occurring and C.J. making a statement and that he spoke with the assistant about the case. Id. at 9:36:46-9:38:07. However, Rowady remembered that his plea discussion with the Commonwealth Attorney about a 20 year plea offer came much later, in the fall of 2000, as the mental health evidence was "evolving." Id. at 9:41:50-9:44:28.

The Commonwealth notes that Rowady had at least six contacts with C.J. before his confession to police, but offers no details of those contacts. Commonwealth's Brief, p. 6.

Throughout his testimony, Rowady indicated that he believed C.J.'s statement would implicate Daniel Cameron in the crime and, therefore, lead the police to focus on Cameron. Id. at 9:34:05-9:34:55, 9:53:38-9:56:29, 10:42:22. He offered this belief in response to a question about what legal knowledge he had at the time of C.J.'s statement regarding the need to involve the Commonwealth Attorney in a defendant's statement in order to render that statement inadmissible as part of plea negotiations. Id. at 10:40:22-10:42:59. Rowady's only explanation for failing to involve the Commonwealth Attorney

[1] The Commonwealth's brief incorrectly puts the date of the confession as February 6, 2001, not February 6, 2000. Commonwealth's Brief, p. 2. This appears to simply be a typo.

– that the Commonwealth Attorney did not participate in proffers – was contradicted by the Commonwealth Attorney at the evidentiary hearing. V.R. 12/7/09, 10:58:45-11:00:29.

While C.J. was awaiting trial in Circuit Court, Dr. Roxanne Brinley, a clinical psychologist, began seeing him on a regular basis. T.R. Vol. I, 124-26. However, weekly visits proved inadequate to control C.J.'s mental illness. While at the jail, C.J. "frequently expressed suicidal intentions" and was kept in isolation and "monitored closely in an attempt to avoid catastrophic results." T.R. Vol. I, 141. Upon request of Dr. Brinley, the court ordered C.J. transferred from the jail to Caritas Peace Center in Louisville, Kentucky pending trial. T.R. Vol. I, 147-49. The basis for this transfer was Dr. Brinley's statement that C.J. was acutely suicidal and was in need of daily, intense mental health treatment. T.R. Vol. I, 143.

Due to C.J.'s mental health status, defense counsel had Dr. Robert Granacher evaluate C.J. T.R. Vol. II, 174-75. Dr. Granacher concluded that C.J. was incompetent to stand trial. See, sealed competency report in clerk's office. After Dr. Granacher's evaluation, the Commonwealth moved to have their expert evaluate C.J. An evaluation was performed by Dr. Dennis J. Buchholz, through a referral from KCPC. T.R. Vol. II, 174-75. V.R. 8/8/01, 9:12:30. Dr. Buchholz opined that "with regard to the issue of criminal responsibility it is believed that due to mental illness, Chris [C.J.] had impaired understanding of the criminality of his actions and was not capable of controlling his behavior at the time the events in question occurred." See, sealed report in clerk's office. Dr. Buchholz further stated, "The opinion of this examiner is that Chris McGorman [C.J.] was not criminally responsible at the time the events in question occurred...with regard to

the question of current competency to stand trial Chris [C.J.] demonstrates an adequate understanding of the charges against him and the capacity to contribute to his own defense. In this examination Christopher McGorman is competent to stand trial." Id.

After holding a competency hearing, the trial court determined that C.J. was competent to stand trial. T.R. Vol. II, 202-203. The court based its opinion on a videotaped deposition of Dr. Granacher, presented by the defense, and the testimony of Dr. Buchholz, presented by the Commonwealth. Id. No evaluation was completed prior to or at the time of C.J.'s statement to police. Thus, it is unclear whether he was competent or sane when he was interrogated . Nor had C.J. received the needed psychiatric treatment at that time, as he had before being found competent to stand trial.

C.J.'s parents decided that Rowady was not handling the case appropriately and Hon. Andrew Stephens was retained as substitute counsel approximately 60 days before trial. T.R. Vol. II 218, 224-25. A motion requesting a change of venue was argued by Stephens and ruled on eight days prior to the scheduled trial date. The trial court granted a change of venue and the trial was assigned to the Madison Circuit Court. T.R. Vol. III, 305.

The trial commenced on August 6, 2001. The Sheriff's office transported C.J. to the trial from Caritas, where he had been undergoing psychiatric treatment for more than a year. T.R. Vol. III, 307-308.

Early on in C.J.'s trial, he began to decompensate by rocking continuously back and forth in his chair and becoming visibly upset. V.R. 8/7/01, 8:58:57 *et seq*. When C.J. had this breakdown, trial counsel did not seek a mistrial or ask for a contemporaneous competency evaluation. Nor did the court halt the proceedings to have C.J. evaluated. Instead, counsel asked that C.J. be removed from the courtroom leaving

C.J. to spend virtually all of his trial in a back room, watching his trial on closed circuit television. V.R. 8/7/01, 8:58:57-9:00:16. C.J. and his counsel did not communicate during the trial proceedings except during recesses and break. T.R. PC Vol. IV, 544-45. C.J. continued to struggle throughout the trial prompting his his psychiatrist to increase the dosage of his medication so that C.J. could control himself during the three days it took to conduct the trial.

Following three days of trial, the jury began deliberating and, at shortly after 9:00 pm, gave the court a note that it was unable to reach a verdict. T.R. Vol. III, 325. After the usual instruction, the jury resumed deliberations, and, after a series of notes went back and forth in part over the objection of the defense, eventually returned a verdict of guilty as to Murder, Burglary in the First Degree, and Defacing a Firearm. T.R. Vol. III, 341, 342, 344.

The sentencing phase of trial began on August 9, 2001. The jury again indicated that it was unable to reach a verdict, T.R. Vol. III, 345, but, after the usual instruction, the jury ultimately returned with a recommended sentence of life on the Murder count, ten years on the Burglary First and 12 months on Defacing a Firearm. T.R. Vol. III, 344, 349.

Stephens continued representing C.J. on his direct appeal. A review of the Opinion of this Court sets out multiple errors by Stephens in his role as trial counsel in failing to properly preserve several important issues for appeal. McGorman v. Commonwealth, 2003 WL 21258361 (Ky. 2003). Regarding C.J.'s claim that the court erred in allowing Dr. David Shraberg to testify for the Commonwealth as an expert, the Court ruled that the issue had not been preserved and observed that counsel should have attacked Dr. Shraberg's testing procedures in a pre-trial "Daubert hearing." Id. at 1.

The Court also discussed the issue that "C.J.," a juvenile, was questioned without his parents present. The Court explained how the proper issue would have dealt with the voluntariness of the statement, but that counsel failed to properly preserve that issue on appeal. Id. at 2. The Court further discussed the claim that the trial court should have excluded C.J.'s videotaped confession because there were two versions of the video and C.J.'s counsel had only been provided with one version. The tape provided to counsel included statements about molestation suffered by C.J. The tape offered at trial did not include this vital reference. Although the Court found that the error was harmless because evidence of the molestation was introduced through expert testimony, the Court explained that trial counsel had again failed to properly preserve this issue for appeal. Id.

In its Opinion, the Court also explained that C.J.'s argument concerning admonitions to the jury regarding their deadlock lacked any support and was unpreserved for review. Id. Following his unsuccessful appeal, C.J. filed an RCr 11.42 and CR 60.02 motion. T.R. PC Vol. I, 32-68, 102-120; PC Vol. II, 239-49; PC Vol. III, 417-30. The Madison Circuit Court denied numerous claims without a hearing, held an evidentiary hearing on some of C.J.'s claims, and denied all of C.J.'s remaining claims following the hearing. See, Appendix 2-4.

On appeal to the Court of Appeals, the Court granted C.J. relief on two issues. The Court ordered an evidentiary hearing on the issue of whether C.J. had been informed of the twenty-year plea offer. Appendix 1, p. 6. And the Court remanded the case for a new trial based on trial counsel's ineffectiveness in allowing his juvenile client to confess to murder. The Court stated:

> In this action, Rowady was appointed shortly after the murder at issue took place. Rather than investigating the incident, having his client evaluated and speaking with a prosecutor about the possibility of a police interview,

> Rowady allowed McGorman to be interviewed by the police. As stated earlier, Rowady asserted this was trial strategy.
>
> In *Miller v. Francis*, 269 F.3d 609, 615-16 (6th Cir. 2001), the 6th Circuit Court of Appeals held that:
>
> > A strategic decision cannot be the basis for a claim of ineffective assistance unless counsel's decision is shown to be so ill-chosen that it permeates the entire trial with obvious unfairness. *Hughes [v. United States,* 258 F.3d 453, 457 (6th Cir. 2001)]. Despite the strong presumption that defense counsel's decisions are guided by sound trial strategy, it is not sufficient for counsel to merely articulate a reason for an act or omission alleged to constitute ineffective assistance of counsel. The trial strategy itself must be objectively reasonable. *See Strickland*, 466 U.S. at 681, 104 S.Ct. at 2061.
>
> In this case, it does not seem "reasonable" trial strategy to allow a juvenile to be interviewed by the police and confess when defense counsel has not had the juvenile evaluated by a mental health professional nor spoken to a prosecutor about the effect of the statement.

Appendix 1, p. 20-21. The Commonwealth's Motion for Discretionary Review was granted, as was McGorman's cross-motion. This appeal follows. Further facts will be developed as necessary.

INEFFECTIVE ASSISTANCE OF COUNSEL STANDARD

Mr. McGorman raises multiple claims of ineffective assistance of counsel. The standard applicable to each claim will be laid out here. Ineffective assistance of counsel claims are reviewed *de novo* under the two-part test set forth in Strickland: (1) was counsel's representation deficient in that it "fell below an objective standard of reasonableness" and (2) was the defendant "prejudiced by his attorney's substandard performance." Strickland v. Washington, 466 U.S. 668, 687-88, 692 (1984).

When assessing whether counsel's performance was deficient, a court "must conduct an objective review of counsel's performance, measured for reasonableness

under prevailing professional norms, which includes a context-dependent consideration of the challenged conduct as seen from counsel's perspective at the time." Wiggins v. Smith, 539 U.S. 510, 523 (2003) (internal citation omitted).

"It is unquestioned" that counsel has "an obligation to conduct a thorough investigation." Porter v. McCollum, 130 S.Ct. 447, 452 (2009). The duty to investigate "derives from counsel's basic function, which is to make the adversarial testing process work in the particular case." Towns v. Smith, 395 F.3d 251, 258 (6th Cir. 2005). "Counsel cannot reasonably advise a client about the merits of different courses of action, the client cannot make informed decisions, and counsel cannot be sure of the client's competency to make such decisions unless counsel has first conducted a thorough investigation with respect to both phases of the case." Id. at 694. Conducting "a partial, but ultimately incomplete . . . investigation does not satisfy Strickland's requirements," either. Id. at 694. To determine whether an attorney's investigation is reasonable, "a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." Wiggins v. Smith, 539 U.S. 510, 527 (2003).

Moreover, so-called strategic choices "made after less than complete investigation will not pass muster as an excuse when a full investigation would have revealed a large body of [exculpatory or] mitigating evidence." Dickerson, 453 F.3d at 696; see also Towns, 395 F.3d at 258 ("A purportedly strategic decision is not objectively reasonable when the attorney has failed to investigate his options and make a reasonable choice between them.") "[T]he Court has warned against a tendency to invoke 'strategy' as a 'post-hoc rationalization of counsel's conduct rather than an accurate description of his or

her decisions prior to sentencing' to explain counsel's decisions." Williams v. Anderson, 460 F.3d 789, 802 (6th Cir. 2006) (*quoting* Wiggins, 539 U.S. at 527). See e.g., United States ex rel. Hampton v. Leibach, 347 F.3d 219, 249 (7th Cir. 2003) (recognizing that "an attorney's decisions are not immune from examination simply because they are deemed tactical"); Morales v. Mitchell, 507 F.3d 916, 930 (6th Cir. 2007) (recognizing that even where a strategic decision has been made, a court must still determine if the acts or omissions of counsel were outside the range of professionally competent assistance).

The movant must also "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. A defendant "need not show that counsel's deficient conduct more likely than not altered the outcome of the case." Id. at 693. The result of a proceeding can be rendered unreliable even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome. Id. at 694.

ARGUMENT I

The Court of Appeals Correctly Held that McGorman Was Denied Effective Assistance of Counsel When Without Any Pretrial Negotiation or Any Attempt at Negotiations with the Prosecutor, Counsel Advised McGorman to Confess to Police

In the early stages of the police investigation, C.J.'s parents retained Hon. Alex Rowady to represent C.J. Unfortunately, counsel promptly advised his 14 year old client to confess to the police. Later testimony by both Dr. Buchholz, a psychologist, and Dr. Granacher, a psychiatrist, indicated that C.J. was suffering from a severe mental illness at or near the time of this interrogation. However, as evidenced by counsel's testimony at the evidentiary hearing, counsel had done nothing to investigate C.J.'s mental status before

C.J. gave his statement. Nor had counsel spoken with the Commonwealth regarding the future admissibility of C.J.'s statements before advising him to confess.

The Court of Appeals held that counsel's conduct fell below the standard for effective representation required by the Sixth Amendment to the U.S. Constitution and Sections Seven and Eleven of the Kentucky Constitution. See, Strickland v. Washington, 466 U.S. 668 (1984). Without counsel's action, C.J. would not have confessed to police and could have been evaluated and treated by psychiatric experts prior to making any decision about talking to the police. C.J. was clearly prejudiced by the Commonwealth's repeated references to his videotaped confession, V.R. 8/6/01, 11:13:00-11:15:50; 14:38:49-15:26:14; 8/8/01, 11:39:30-12:10:06, and Dr. Shraberg's reliance on this videotape in diagnosing C.J. as a psychopath, V.R. 8/8/01, 9:10:25, despite other experts' diagnosis that C.J. was suffering from psychosis.

Contrary to the Commonwealth's characterization, the Court of Appeals' opinion was a straightforward application of the Strickland standard. The Court of Appeals correctly applied the deficient performance prong of Strickland, discussed above, in stating:

> In this action, Rowady was appointed shortly after the murder at issue took place. Rather than investigating the incident, having his client evaluated and speaking with a prosecutor about the possibility of a police interview, Rowady allowed McGorman to be interviewed by the police. As stated earlier, Rowady asserted this was trial strategy.
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> In *Miller v. Francis*, 269 F.3d 609, 615-16 (6th Cir. 2001), the 6th Circuit Court of Appeals held that:
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> counsel's decisions are guided by sound trial strategy, it is not sufficient for counsel to merely articulate a reason for an act or omission alleged to constitute ineffective assistance of counsel. The trial strategy itself must be objectively reasonable. *See Strickland*, 466 U.S. at 681, 104 S.Ct. at 2061.
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> In this case, it does not seem "reasonable" trial strategy to allow a juvenile to be interviewed by the police and confess when defense counsel has not had the juvenile evaluated by a mental health professional nor spoken to a prosecutor about the effect of the statement.

Appendix 1, p. 20-21.

Professor William H. Fortune of the University of Kentucky College of Law testified at C.J.'s RCr 11.42 evidentiary hearing and explained the proper way under prevailing professional norms for a defense attorney to go about having his client give a statement to advance plea negotiations. Prof. Fortune opined that Rowady's actions in regard to C.J.'s statement to the police were not reasonable because Rowady did not fully investigate the case, did not approach the prosecutor to have C.J. make a statement as part of plea negotiations, and did not get anything in writing from the prosecutor. V.R. 12/7/09.

In answer to a request to summarize his testimony, Prof. Fortune stated that in a "serious case" such as a "homicide," it was not "reasonable" for a client to give a statement without the defense counsel first conducting a full investigation and receiving discovery. V.R. 12/7/09, 11:27:16-11:29:15. Prof. Fortune added, "And it is doubly unreasonable if the defense counsel were to allow the client to make such a statement without having the involvement of a prosecutor so as to make that statement inadmissible in the event that plea negotiations failed." Id.

This Court has made clear that statements made by a defendant as part of plea negotiations cannot be used in court against the defendant. Kreps v. Commonwealth, 286 S.W.3d 213 (Ky. 2009). Further, Prof. Fortune's affidavit, T.R. PC Vol. II, 210-11, provides legal authority for the proposition that a defense attorney should not allow or advise his client to give a statement to the police without thoroughly investigating his case, reviewing discovery, approaching the prosecutor regarding the possibility of the accused making a statement, and having an agreement with the prosecutor about the statement. Judged against prevailing professional norms, Rowady's performance was clearly deficient. His so-called "strategy" of having C.J. point the finger at David Cameron without *any* preparation beforehand was unreasonable because C.J. incriminated himself without any benefit in return for his statement. Counsel made no effort to negotiate a favorable outcome for C.J. or, failing that, ensure that C.J's confession was provided within the context of a plea negotiation so that if a favorable agreement was not reached, C.J.'s statement could not be used against him in court.

In an attempt to explain C.J.'s counsel's failure to speak to the prosecutor about the effect of his statement beforehand, the Commonwealth notes, "When asked what consideration he had given to having the Commonwealth's Attorney present for the statement, Mr. Rowady answered by way of saying that when McGorman, whom they had been keeping apprised of the mounting evidence, informed one of Mr. Rowady's investigators on Friday that he had shot Larry Raney, then Mr. Rowady, an investigator or two, and a law partner went to McGorman's house to inform the parents." Commonwealth's Brief, p. 8. In other words, Rowady gave **no** consideration to having

the Commonwealth Attorney present for C.J.'s statement or talking to the prosecutor regarding the admissibility of the statement.

The Commonwealth emphasizes that Rowady felt like "time was of the essence," Commonwealth's Brief, p. 9, but a general sense of urgency on the part of defense counsel does not excuse his failure to conduct *any* pretrial investigation or negotiation before sacrificing his fourteen year old client to the police. "[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Strickland, at 466 U.S. 690-691. Reasonable professional judgment does not support his complete lack of pre-trial investigation or attempt at negotiation before instructing his client to confess to murder. Neither Rowady nor the Commonwealth explains why Rowady could not have spoken with the prosecutor regarding C.J. giving a statement to police. Rowady took the time to arrange a polygraph for C.J. . before C.J. confessed. Surely then, Rowady had time to talk with the prosecutor before deciding whether to advise C.J. to confess. Rowady's "strategy" of giving a timely statement to police pointing them in the direction of a more culpable party could have been achieved while also ensuring that C.J.'s statement would not be used against him at trial. Or, in the event Rowaday and the prosecutor could not reach an agreement, decide, as would any reasonably effective attorney, against urging his client to confess to the police (on camera). All that was required was a conversation with the prosecutor.[2]

[2] The Commonwealth notes that Rowady testified that the Commonwealth Attorney in Madison County did not participate in proffers, Commonwealth's Brief, p. 9, but, a few pages later, notes the Commonwealth

In attempting to justify trial counsel's failure to have "the juvenile evaluated by a mental health professional" before advising him to confess to police, Appendix 1, p. 20-21, the Commonwealth cites Rowady's testimony that, at the time of the statement, there was no indication of any mental problems. But one need only read the Commonwealth's statement of the case to see indications of C.J.'s mental problems. The very facts of fourteen year old C.J's crime would have put a reasonable defense attorney on notice that a mental health evaluation was necessary. While trial counsel was making plans for a polygraph and videotaped confession to police, a reasonably effective attorney would have been consulting a mental health professional to evaluate C.J. The Court of Appeals was correct in its conclusion that "it does not seem 'reasonable' trial strategy to allow a juvenile to be interviewed by the police and confess when defense counsel has not had the juvenile evaluated by a mental health professional nor spoken to a prosecutor about the effect of the statement." Appendix 1, p. 20-21.

Under Strickland, C.J. must also "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland, 466 U.S. at 694. The Court of Appeals correctly applied the prejudice prong of Strickland when it stated:

> McGorman's trial was tainted by his interrogation from the very beginning. Mental health professionals testified that McGorman was suffering from mental illness at the time of the murder and during the police interrogation. His counsel's failure to conduct an investigation, have him evaluated, and talk to a prosecutor prior to his surrender to the police for an interrogation clearly affected his ability to receive a fair trial.

Appendix 1, p. 21.

Attorney's contradiction of Rowady's testimony: "the Commonwealth explained that this was not to say that the Commonwealth would not talk to a defense attorney during plea bargaining about what a defendant might say." Commonwealth's Brief, p. 12.

The Court of Appeals was correct that McGorman's confession "tainted" his entire trial. The Commonwealth repeatedly referenced McGorman's videotaped confession during trial in order to undercut McGorman's insanity defense, V.R. 8/6/01, 11:13:00-11:15:50; 14:38:49-15:26:14; 8/8/01, 11:39:30-12:10:06. The prosecutor talked about the statement in his opening statement to argue that C.J. was sane at the time of the crime. V.R. 8/6/01, 11:13:00-11:15:50. The Commonwealth played C.J.'s statement for the jury. Id. at 14:38:49-15:26:14. The Commonwealth's expert, Dr. Shraberg, heavily focused on the videotape in diagnosing C.J., a 14-year-old child,[3] as a psychopath, V.R. 8/8/01, 9:10:25, 10:26:30, despite other experts' diagnosis that C.J. was suffering from psychosis. The prosecution relied on the statement throughout its closing argument as proof that C.J. was not insane. In a closing argument that lasted just over 30 minutes, the prosecutor referred to C.J.'s statement for this purpose no less than thirteen (13) times. V.R. 8/8/01, 11:39:30-12:10:06. Finally, the jury asked to view the statement again during deliberations before eventually sentencing him to the maximum penalty.Id. at 16:23:57-17:11:22. As the Court of Appeals held, the use of and reliance on C.J.'s statement throughout the trial to undermine his only defense constitutes prejudice under Strickland.

The Commonwealth claims that the Court of Appeals improperly held that McGorman was prejudiced because his confession will still be admissible at a new trial: "The Commonwealth is not aware of any statutory or case law which would prevent the Commonwealth from using McGorman's statement upon retrial of the case."

[3] Dr. Shraberg diagnosed C.J., a 14-year-old, with a testing instrument that was not approved for use on individuals under the age of 18 and was designed only to determine whether the subject was malingering, not whether they were mentally ill or criminally responsible. See Argument V.A. below. And the Commonwealth only retained Dr. Shraberg after their initial expert, Dr. Buckholz, concluded that C.J. was not criminally responsible for his actions due to psychosis.

Commonwealth's Brief, p. 22. First, this specious argument should be rejected because it was not made before the Circuit Court and was not presented to the Court of Appeals until the Commonwealth's Petition for Rehearing. The Commonwealth cannot "feed one can of worms to the trial judge and another to the appellate court." Kennedy v. Commonwealth, 544 S.W.2d 219 (Ky. 1977).

More to the point, there is ample, long-standing, and unquestioned authority for holding that there was sufficient state action to suppress McGorman's statement and suppression of the statement is the appropriate remedy for McGorman's counsel's ineffectiveness. More than twenty years ago the United States Supreme Court held that, even when defense counsel is retained rather than appointed, a criminal trial is sufficient state action to hold the state responsible for the ineffectiveness of defense counsel:

> We turn next to the claim that the alleged failings of Sullivan's retained counsel cannot provide the basis for a writ of habeas corpus because the conduct of retained counsel does not involve state action.[6] A state prisoner can win a federal writ of habeas corpus only upon a showing that the State participated in the denial of a fundamental right protected by the Fourteenth Amendment. The right to counsel guaranteed by the Sixth Amendment is a fundamental right. *Argersinger v. Hamlin*, 407 U.S. 25, 29-33, 92 S.Ct. 2006, 2008-2010, 32 L.Ed.2d 530 (1972). In this case, Sullivan retained his own lawyers, but he now claims that a conflict of interest hampered their advocacy. He does not allege that state officials knew or should have known that his lawyers had a conflict of interest. Thus, we must decide whether the failure of retained counsel to provide adequate representation can render a trial so fundamentally unfair as to violate the Fourteenth Amendment.
>
> **This Court's decisions establish that a state criminal trial, a proceeding initiated and conducted by the State itself, is an action of the State within the meaning of the Fourteenth Amendment.** See *Lisenba v. California*, 314 U.S. 219, 236-237, 62 S.Ct. 280, 289-290, 86 L.Ed. 166 (1941); *Moore v. Dempsey*, 261 U.S. 86, 90-91, 43 S.Ct. 265, 266, 67 L.Ed. 543 (1923). The Court recognized as much in *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), when it held that a defendant who must face felony charges in state court without the assistance of counsel guaranteed by the Sixth Amendment has been

denied due process of law. **Unless a defendant charged with a serious offense has counsel able to invoke the procedural and substantive safeguards that distinguish our system of justice, a serious risk of injustice infects the trial itself.** ***Id.*****, at 344, 83 S.Ct., at 796; see** ***Johnson v. Zerbst*****, 304 U.S. 458, 467-468, 58 S.Ct., 1019, 1024, 82 L.Ed. 1461 (1938). When a State obtains a criminal conviction through such a trial, it is the State that unconstitutionally deprives the defendant of his liberty.** See *Argersinger v. Hamlin, supra*, at 29-33, 92 S.Ct., at 2008-2010.[7]

Our decisions make clear that inadequate assistance does not satisfy the Sixth Amendment right to counsel made applicable to the States through the Fourteenth Amendment. A guilty plea is open to attack on the ground that counsel did not provide the defendant with "reasonably competent advice." *McMann v. Richardson*, 397 U.S. 759, 770-771, 90 S.Ct. 1441, 1448-1449, 25 L.Ed.2d 763 (1970); see *Tollett v. Henderson*, 411 U.S. 258, 267, 93 S.Ct. 1602, 1608, 36 L.Ed.2d 235 (1973). Furthermore, court procedures that restrict a lawyer's tactical decision to put the defendant on the stand unconstitutionally abridge the right to counsel. *Brooks v. Tennessee*, 406 U.S. 605, 612-613, 92 S.Ct. 1891, 1895, 32 L.Ed.2d 358 (1972) (requiring defendant to be first defense witness); *Ferguson v. Georgia*, 365 U.S. 570, 593-596, 81 S.Ct. 756, 768-770, 5 L.Ed.2d 783 (1961) (prohibiting direct examination of defendant). See also *Geders v. United States*, 425 U.S. 80, 96 S.Ct. 1330, 47 L.Ed.2d 592 (1976); *Herring v. New York*, 422 U.S. 853, 95 S.Ct. 2550, 45 L.Ed.2d 593 (1975). **Thus, the Sixth Amendment does more than require the States to appoint counsel for indigent defendants. The right to counsel prevents the States from conducting trials at which persons who face incarceration must defend themselves without adequate legal assistance.**

A proper respect for the Sixth Amendment disarms petitioner's contention that defendants who retain their own lawyers are entitled to less protection than defendants for whom the State appoints counsel. We may assume with confidence that most counsel, whether retained or appointed, will protect the rights of an accused. But experience teaches that, in some cases, retained counsel will not provide adequate representation. The vital guarantee of the Sixth Amendment would stand for little if the often uninformed decision to retain a particular lawyer could reduce or forfeit the defendant's entitlement to constitutional protection.[8] Since **the State's conduct of a criminal trial itself implicates the State in the defendant's conviction**, we see no basis for drawing a distinction between retained and appointed counsel that would deny equal justice to defendants who must choose their own lawyers.[9]

Cuyler v. Sullivan, 446 U.S. 335, 342-45 (1980) (emphasis added). "The constitutional mandate [of effective assistance of counsel] is addressed to the action of the State in obtaining a criminal conviction through a procedure that fails to meet the standards of due process of law." Evitts v. Lucey, 469 U.S. 387 (1985).

This principle – that the Commonwealth is responsible for the effectiveness of defense counsel, whether retained or appointed – has not been seriously questioned and the Commonwealth does not cite to a single case supporting their contention that the Commonwealth is not responsible for McGorman's counsel's ineffectiveness. In McGorman's case, the Commonwealth's action in "obtaining a criminal conviction through a procedure" where McGorman was denied the effective assistance of counsel is sufficient to hold the Commonwealth responsible for McGorman's failure to receive a fair trial. Id.

Likewise, as the Court of Appeals ordered, the appropriate remedy for McGorman's counsel's ineffectiveness in advising him to confess to police is to exclude McGorman's confession at retrial:

> **Sixth Amendment deprivations are subject to the general rule that remedies should be tailored to the injury suffered from the constitutional violation** and should not unnecessarily infringe on competing interests. Our relevant cases reflect this approach. In Gideon v. Wainwright, supra, the defendant was totally denied the assistance of counsel at his criminal trial. In *Geders v. United States*, supra, *Herring v. New York*, *supra*, and *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932), judicial action before or during trial prevented counsel from being fully effective. In *Black v. United States*, 385 U.S. 26, 87 S.Ct. 190, 17 L.Ed.2d 26 (1966), and *O'Brien v. United States*, 386 U.S. 345, 87 S.Ct. 1158, 18 L.Ed.2d 94 (1967), law enforcement officers improperly overheard pretrial conversations between a defendant and his lawyer. None of these deprivations, however, resulted in the dismissal of the indictment. Rather, the conviction in each case was reversed and the Government was free to proceed with a new trial. Similarly, **when before trial but after the institution of adversary proceedings, the**

> **prosecution has improperly obtained incriminating information from the defendant in the absence of his counsel, the remedy characteristically imposed is not to dismiss the indictment but to suppress the evidence or to order a new trial if the evidence has been wrongfully admitted and the defendant convicted.** *Gilbert v. California*, *supra*; *United States v. Wade*, *supra*; *Massiah v. United States*, *supra*. In addition, certain violations of the right to counsel may be disregarded as harmless error. Compare *Moore v. Illinois*, *supra*, 434 U.S. at 232, 98 S.Ct. at 466, with *Chapman v. California*, 386 U.S. 18, 23, and n. 8, 87 S.Ct. 824, 827, and n. 8, 17 L.Ed. 2d 705 (1967).
>
> **Our approach has thus been to identify and then neutralize the taint by tailoring relief appropriate in the circumstances to assure the defendant the effective assistance of counsel and a fair trial.** The premise of our prior cases is that the constitutional infringement identified has had or threatens some adverse effect upon the effectiveness of counsel's representation or has produced some other prejudice to the defense. Absent such impact on the criminal proceeding, however, there is no basis for imposing a remedy in that proceeding, which can go forward with full recognition of the defendant's right to counsel and to a fair trial.

U.S. v. Morrison, 449 U.S. 361 (1981) (emphasis added).

Courts do not have a one-size-fits-all remedy for the denial of effective assistance of counsel, but craft remedies to address the injury at issue. See e.g., Osborne v. Com., 992 S.W.2d 860, 866 (Ky. App. 1998) (holding that remedy for ineffective assistance of counsel in failing to communicate the Commonwealth's plea offer would be specific performance of the plea offer); Commonwealth v. Wine, 694 S.W.2d 689, 695 (Ky. 1985) (holding that remedy for ineffective assistance of appellate counsel in failing to file a brief would be reinstatement of the appeal).

To put it simply, "the means by which to repair the constitutional deprivation is to restore [McGorman] to the position in which he would have been had the denial not occurred." Osborne, at 866. In McGorman's case, that clearly requires the exclusion of his confession at his retrial. Were it otherwise – were the Commonwealth's argument to

prevail – McGorman would be left without a remedy for what the Court of Appeals has held was the unconstitutional deprivation of effective assistance of counsel.

ARGUMENT II

The Court of Appeals Correctly Remanded this Case for an Evidentiary Hearing on McGorman's Claim that He Was Denied Effective Assistance of Counsel When Trial Counsel Failed to Convey a Twenty-Year Plea Offer to Him

The Court of Appeals granted McGorman relief on his claim that he received ineffective assistance of counsel when counsel failed to inform him of the Commonwealth's twenty-year plea offer: "We agree that McGorman should have had an evidentiary hearing on this matter. While Rowady contends that he did convey the offer to McGorman's parents, they assert that he did not. Rowady tends to indicate that he cannot remember with certainty that he conveyed it to McGorman." Appendix 1, p. 6. The Commonwealth did not raise this issue in its Motion for Discretionary Review, nor in its Brief. Therefore, the Court of Appeals holding must stand.

ARGUMENT III

McGorman Was Denied Effective Assistance of Counsel and Due Process When The Trial Court Failed to Hold, and Trial Counsel Failed to Request, a Competency Hearing When McGorman Decompensated During Trial and Had to be Removed from the Proceedings

This issue was preserved by McGorman's supplement to his RCr 11.42/CR 60.02 motions. T.R. PC Vol. 239-49. Claims of ineffective assistance of counsel are mixed questions of law and fact reviewed *de novo*.

The Sheriff's Office transported C.J. to trial from Caritas, a mental health hospital in Louisville, Kentucky, where he had been undergoing psychiatric treatment for almost a

year. T.R. Vol. II, 307-308. At the time of trial, C.J. was on psychotropic medication. V.R. 8/8/01, 9:07-9:18. These facts were known to all involved in the trial of this case.

At the beginning of C.J.'s trial, he began to decompensate by rocking back and forth and becoming visibly upset. V.R. 8/7/01, 8:58:57 *et seq.* When C.J. had this breakdown, counsel did not seek a mistrial or ask for a contemporaneous competency evaluation. Nor did the trial court halt the proceedings to have C.J. evaluated.

As a result of C.J.'s bizarre behavior, counsel asked that C.J. be removed from the courtroom, and C.J. spent virtually all of his trial in a back room, watching his trial on closed circuit television. V.R. 8/7/01, 8:58:57-9:01:53. At one point, his psychiatrist increased the dosage of his medication so that C.J. could control himself during the trial.

Despite this, the Court of Appeals stated, "There is sufficient evidence that the trial court examined McGorman's behavior and found that there was nothing to indicate he was not incompetent." Appendix 1, p. 10. This holding was in error and the Circuit Court should have granted an evidentiary hearing regarding the trial court and counsel's failure to reevaluate C.J's competency.

In mandating what must happen once anyone within the trial process has reasonable notice that a defendant may not meet the competency to stand trial standard, KRS 504.100(1) states:

> If upon arraignment, **or during any stage of the proceedings**, the court has reasonable grounds to believe the defendant is incompetent to stand trial, the court shall appoint at least one (1) psychologist or psychiatrist to examine, treat and report on the defendant's mental condition.

KRS 504.100(1) (emphasis added). Competency to stand trial is a fleeting condition for many people. "Competency to stand trial pertains to the defendant's mental state **at the time of the trial,** whereas an insanity defense concerns the defendant's mental state at

the time of the commission of the crime." Bishop v. Caudill, 118 S.W.3d 159, 162 (Ky. 2003) (emphasis added). In other words, competency to stand trial literally can be here today and gone tomorrow. Rather than request that the court take the action required by KRS 504.100, defense counsel asked that C.J. be removed from the courtroom, where he could not communicate with counsel or participate in his defense.

Not only was counsel aware of C.J.'s decompensation, the trial court was also aware of it and had an obligation to order that C.J. be evaluated. Yet rather than order that C.J. be evaluated, the court instead granted counsel's grossly inadequate request to have C.J. removed from the courtroom due to his extreme anxiety, nervousness, and bizarre behavior. Remarkably, the prosecutor in closing argument referred several times to C.J.'s rocking back and forth and his bizarre behavior before he was removed from the courtroom. V.R. 8/8/01, 11:39:30-12:10:06. Yet no one addressed C.J.'s behavior by doing the one thing that was required – having him evaluated and conducting a competency hearing.

Settled law requires the circuit court to order a competency evaluation and conduct the mandatory hearing in circumstances such as in the current case. In Gardner v. Commonwealth, 642 S.W.2d 584, 585 (Ky. 1982), the Court noted that, due to the defendant's bizarre behavior, "...the majority of the trial was conducted with the defendant out of the courtroom," and there was other evidence that the defendant suffered from mental illness and may not have been competent to stand trial. Id. In such circumstances, a competency evaluation and hearing are required. Id.

KRS 504.060(4) defines incompetence to stand trial as:

> "Incompetency to stand trial" means, as a result of mental condition, lack of capacity to appreciate the nature and

> consequences of the proceedings against one or to participate rationally in one's own defense.

C.J. could not and did not rationally participate in his own defense. As in Gardner, C.J. was not able to participate in his trial even before he was removed from the courtroom, and thus could not meet the requirements of KRS 504.060(4). Rather than sequester him in a back room, the Court should have stopped the trial and addressed the competency concerns. Absent the Court following this course of action, counsel should have asked for a mistrial and a new competency evaluation. Even though C.J. was found competent at his earlier hearing, there were more than "... reasonable grounds to believe that [he] was incompetent to stand trial..." as the trial began. KRS 504.100(1).

At the evidentiary hearing[4], Stephens acknowledged that C.J. was rocking back and forth in his chair in front of the jury, that he asked to have C.J. removed from the courtroom, and that C.J. was not helping him before or during the trial, including while he was watching the trial on closed circuit television. V.R. 12/7/09, 11:36:09 *et seq*.

In his testimony, Stephens appears to believe that C.J.'s decompensation and potential incompetency supported or proved his insanity defense. See e.g., V.R. 12/7/09, 11:36:09-12:01:44. In answer to a question of whether C.J. was participating rationally in his defense, Stephens answered, "No." Id. at 11:55:35. Another time, Stephens said in reference to C.J. assisting in his defense, "Was he helping me? No." Id. at 12:04:43. Stephens also testified, "In a perfect world, when I saw C.J. rocking back and forth, it is certainly a possibility that asking for another competency evaluation would not have been

[4] Although the Circuit Court denied an evidentiary hearing on this issue and denied it on its merits before the evidentiary hearing was held on other claims, some of the testimony is relevant to this issue. This Court should remand for a full hearing on this claim.

an unreasonable thing for me to do." Id. at 11:59:59-12:00:20. However, Stephens explained away his failure to request an evaluation as "trial tactic." Id. at 12:01:44.

The sum of Stephens' testimony was that, as a trial tactic, he went forward with the trial in the face of C.J.'s potential incompetency because that condition supported his insanity defense. Proceeding to a trial with an incompetent or even a questionably incompetent client is simply not an action within the realm of "strategy" or "tactics" and is clearly deficient performance under Strickland.

Given Stephens' testimony and the acknowledgement by the prosecutor and the trial court of C.J's bizarre behavior at trial, it is likely that C.J. was incompetent to stand trial. Yet the trial proceeded anyway. An evidentiary hearing is required to determine whether a retrospective competency evaluation and hearing is allowable. Retrospective competency hearings are disfavored. Dorris v. Commonwealth, 305 S.W.3d 438, 442 (Ky. App. 2010). However, they do comport with the requirements of due process so long as they are "based on evidence related to observations made or knowledge possessed at the time of trial." Thompson I at 409. Factors to consider in determining the constitutional permissibility of a retrospective competency hearing include:

> (1) the length of time between the retrospective hearing and the trial; (2) the availability of transcript or video record of the relevant proceedings; (3) the existence of mental examinations conducted close in time to the trial date; and (4) the availability of the recollections of non-experts – including counsel and the trial judge – who had the ability to observe and interact with the defendant during trial.

Id. These factors are not inclusive, and no one factor is determinative. Id. at 410. Rather, the determination is made on a case-by-case basis. Id. Ultimately, "[t]he test to be applied in determining whether a retrospective competency hearing is permissible is whether the 'quantity and quality of available evidence is adequate to arrive at an

assessment that could be labeled as more than mere speculation.'" Id. (citations omitted). As the Court made clear in Thompson I, if retrospective competency hearings could not be held, the courts would have to vacate the convictions and order current competency evaluations and hearings.

ARGUMENT IV

McGorman Was Denied Effective Assistance of Counsel and Due Process When Trial Counsel Had Him Removed from His Trial without Waiving His Presence

This issue was preserved by McGorman's supplement to his RCr 11.42/CR 60.02 motions. T.R. PC Vol. II, 239-49. Claims of ineffective assistance of counsel are mixed questions of law and fact reviewed *de novo*.

C.J.'s counsel was ineffective for having him removed from his trial without having C.J. waive his presence. In denying this claim, the Court of Appeals stated, "Given the actions exhibited by McGorman during trial and his ***counsel's*** waiver, the trial court correctly denied McGorman's motion on this issue." Appendix 1, p. 10 (emphasis added). However, ***McGorman*** never waived his appearance.

A criminal defendant has a right to be present at every critical stage of the proceeding. See, Illinois v. Allen, 397 U.S. 337, 338 (1970) ("[o]ne of the most basic rights guaranteed by the Confrontation Clause is the accused's right to be present in the courtroom at every stage of his trial"); Snyder v. Massachusetts, 291 U.S. 97, 107–08 (1934) (*overruled on other grounds by* Malloy v. Hogan, 378 U.S. 1 (1964)) ("the presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence"); Carver v. Commonwealth, 256 S.W.2d 375,

377 (Ky. 1953) ("[t]his court has long recognized the importance of the constitutional right of the accused to be present with his counsel at all stages of a trial").

"The presence of the accused is not a mere form. It is of the very essence of a criminal trial not only that the accused shall be brought face to face with the witnesses against him, but also with his triers. He has a right to be present not only that he may see that nothing is done or omitted which tends to his prejudice, but to have the benefit of whatever influence his presence may exert in his favor." Temple v. Commonwealth, 77 Ky. 769, 770–71 (1879).

In denying this claim, the Circuit Court stated, "The Court's primary concern with respect to this issue is whether communication occurred between the defendant and his trial attorney, Hon. Andrew Stephens, during recesses and breaks, which could not be ascertained upon a review of the record. Based upon the testimony of Hon. Andrew Stephens, it appears to this Court that the defendant had opportunities to participate in his own defense despite his absence from the courtroom." Appendix 3, pg. 3-4; T.R. PC Vol. IV, 544-45. The Court also found that "the decision to remove the defendant to the law library was a tactical decision made by Mr. Stephens due to the defendant's age (fifteen years old) and the nervousness, anxiety, and fear the defendant was experiencing at that time, the defendant's behavior, and the role that decision would play in the insanity defense and Mr. Stephens' defense strategy." Appendix 3, pg. 4-5; T.R. PC Vol. IV, 545-46. The Court later noted, "the waiver of a juvenile's constitutional rights and/or whether the Court was able to get an appropriate waiver are appealable issues." Appendix 4, pg. 2; T.R. PC Vol. I, 676.

Being removed from the courtroom at the request of trial counsel violated C.J.'s federal and state constitutional right to be present at all critical phases of the trial. C.J. was not present through much of his own trial, including the testimony of some 14 witnesses. C.J. was also not present for closing arguments, as well as other parts of the proceedings such as discussions over jury instructions. In this case, C.J. was not present for multiple critical phases of his trial and he did not waive his presence.

At the December 21, 2009 evidentiary hearing, Hon. Stephens testified on the subject of the trial court getting an affirmative waiver from C.J. regarding C.J. leaving the courtroom. See V.R. 12/7/09, 11:44:42 – 11:45:59. Stephens testified that he did not believe that C.J. signed any sort of written waiver of his appearance at trial. Id. at 11:45:16. However, Stephens testified, inaccurately, that he believed Judge Jennings conducted a colloquy with C.J. to make sure that it was C.J.'s individual, personal decision to waive his appearance. Id. at 11:44:42 – 11:45:59.

The relevant portion of the trial tape shows that Judge Jennings did not question C.J. or obtain a waiver of his presence. See V.R. 8/7/01, 8:58:57 – 9:01:53. Stephens asked Judge Jennings if C.J. could be excused and watch the trial in a back room, the Commonwealth voiced that it had no objection, the Court granted his motion, and Stephens thanked the Court. Id. at 8:58:57 – 9:00:16. Next, the Circuit Court gestured for C.J. to be taken out and for the jury to be brought in. Id. at 9:00:18. After the jury came in, the Court said that C.J. was not present in the courtroom because he:

> Waived his constitutional right to be present at the proceedings, and is in an adjoining room where he is viewing these via our closed circuit TV. So that's why he's not sitting at the counsel table next to his attorney.

Id. at 9:01:39 – 9:01:53. After the Court's statement regarding C.J.'s absence, the trial resumes. There is no conversation at all between Judge Jennings and C.J. Id. at 8:58:57 – 9:01:53. The written record in this case contains no written waiver of appearance signed by C.J. Put simply, C.J. did not waive his presence at trial.

The right to be present and to confront witnesses is personal to the accused under § 11 of the Kentucky Constitution and only the defendant can waive that right. See Dean v. Commonwealth, 777 S.W.2d 900, 903 (Ky. 1989) (reversed in part on other grounds). In Price v. Commonwealth, 31 S.W.3d 885, 892 (Ky. 2000), this Court remanded for a new trial where the trial court excluded the defendant from the alleged child victim's testimony "purportedly" under KRS 421.350(2). The Court held that the trial procedure in question "violated Appellant's constitutional right of confrontation and his right to be present at every critical state of the trial." Id. at 894. Part of the constitutional violation in Price was because of the technical way that the trial court excluded defendant from the courtroom: "Appellant was not in continuous audio contact with his defense counsel" during the alleged child victim's testimony. Id.

C.J., like Price, viewed his trial on television and was not in "continuous audio contact with his counsel." Id. C.J. did not waive his presence at trial, nor consent to viewing his trial via closed circuit television without continuous contact with counsel. The Circuit Court erred in holding that the contact C.J. had with counsel during breaks remedied any violation. C.J. was entitled to be in continuous contact with his attorney in order to fully participate in the proceedings against him. Id. C.J.'s convictions and sentence should be vacated and his case remanded for a new trial where he is present.

ARGUMENT V

The Circuit Court Erred When It Denied Several of McGorman's RCr 11.42 Claims without Conducting an Evidentiary Hearing

This issue was preserved by McGorman's RCr 11.42 motion and request for an evidentiary hearing. T.R. PC Vol. I, 32-68. The denial of an evidentiary hearing is reviewed *de novo*.

Before a court may dismiss an RCr 11.42 motion without a hearing, the court must accept all of the movant's factual allegations as true and then conclude those facts do not present a valid claim of relief. In Fraser v. Commonwealth, 59 S.W.3d 448, 452-453 (Ky. 2001), this Court held that "a hearing is required if there is a material issue of fact that cannot be conclusively resolved, i.e. conclusively proved or disproved, by an examination of the record . . .. A trial judge may not simply disbelieve factual allegations in the absence of evidence in the record refuting them." (citations omitted). Regarding the following claims, the Court of Appeals stated, "The remaining issues, however, did not require an evidentiary hearing." Appendix 1, p. 11.

A. McGorman Was Denied Effective Assistance of Counsel When Counsel Failed to Object to Dr. Shraberg's Testimony or to Request a Daubert Hearing Regarding His Credentials and Testing Methods

On McGorman's direct appeal, this Court explained that it could not review issues related to prosecution mental health expert, Dr. Shraberg, because the issue was not preserved for appeal. McGorman, at 1. In the Opinion, the Court states:

> Appellant argues that the Commonwealth's expert witness, Dr. Shraberg, was not qualified to render an opinion that Appellant was criminally responsible for the crimes because he administered only the SIRS test, which was not valid for children under the age of eighteen. Further, the appellant alleges that it was error for Dr. Shraberg's wife (a school

> psychologist) to have administered the test to Appellant. The appellant also suggests that he was unaware of Dr. Shraberg's qualifications until trial, yet he concedes that the Commonwealth furnished him with timely notice of the expert's report. The Commonwealth responds that this alleged error is not preserved and we agree.
>
> Appellant refers in his brief to defense counsel's request to voir dire the witness regarding his qualifications and testing procedures, but he does not cite to anywhere in the record this colloquy occurred. His only reference to the record is the cross-examination of Dr. Shraberg regarding the validity of his testing procedures. The proper place for such a challenge, however, is during a pre-trial "Daubert hearing," where the trial judge initially determines if the witness's opinion is based on scientifically valid principles and methodology, thereby rendering the opinion relevant and reliable. Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993); see also Sand Hill Energy, Inc. v. Ford Motor Co., Ky., 83 S.W.3d 483, 489 (2002). It is unclear to us if this expert was challenged at a pre-trial Daubert hearing. Accordingly, Appellant has not indicated to this Court how this issue is preserved for review, and we will not search the record on appeal to make that determination. CR 76.12(4)(c)(iv); Robbins v. Robbins, Ky.App., 849 S.W.2d 571 (1993).

McGorman, at 1.

Trial counsel did not follow the proper, standard procedure for challenging Dr. Shraberg's opinion that C.J. was criminally responsible for his alleged crimes. Requesting a Daubert hearing constituted the proper and effective way to challenge the prosecution's expert. Dr. Shraberg's testimony was critical to the prosecution's case against C.J. The Commonwealth's initial expert, Dr. Buckholz, concluded that C.J. was competent to stand trial, but not criminally responsible for his actions. Only *after* Dr. Buckholz concluded that C.J. was not criminally responsible did the Commonwealth have Dr. Shraberg evaluate C.J. However, the only testing instrument used by Dr. Shraberg was not approved for use on subjects under the age of 18 and was designed only

to determine whether the subject was malingering, not whether they were mentally ill or criminally responsible.

Trial counsel's failure to move for a Daubert hearing was unreasonable and Dr. Shraberg's testimony certainly prejudiced C.J. Had counsel followed the proper course to attack Dr. Shraberg's opinion, there is a reasonable probability that the result would have been different. The prosecution offered no other expert to challenge the state expert, Dr. Buchholz, who had rendered the opinion that C.J. was not criminally responsible for his actions. Nor did the prosecution offer any other expert to contest the psychiatrist who testified for the defense concerning the psychiatric treatment C.J. had undergone.

In denying this claim, the Circuit Court noted, "The jury heard the qualifications and credentials of both doctors, and was able to hear testimony from these controverting experts as to their testing methods. The jury was entitled to place whatever weight it desired on the testimony elicited from the respective witnesses." Appendix 2, pg. 14; T.R. PC Vol. III, 402. The Court went on to hold that "no error occurred by counsel with respect to this claim. Further, the defendant has failed to demonstrate that had counsel filed a pretrial Daubert motion the result would have been any different." Id. The Circuit Court's holding was erroneous because an evidentiary hearing is necessary to determine whether Dr. Shraberg's testimony would have been admitted, in whole or in part.

B. McGorman Was Denied Effective Assistance of Counsel When Counsel Failed to Object to the Improper Admission of Christopher McGorman Sr.'s Guns, which Were Irrelevant to the Crimes Charged

During the course of the trial, the prosecution paraded out in front of the jury not only the alleged murder weapon, but also a series of guns owned by C.J.'s father,

Christopher McGorman, Sr. V.R. 08/06/01, 13:22:09-13:28:21. These additional firearms belonged to Mr. McGorman, not C.J., and there were never any allegations made by the prosecution that any of these other firearms were used in connection with the murder, burglary, or defacing firearm charges for which C.J. was before the court.

The Commonwealth's introduction of these weapons served only to paint an increasingly negative image of C.J. in the mind of the jury. The Commonwealth had the alleged murder weapon in its possession, to present as valid evidence. It did not need to parade an arsenal of weapons in front of the jury to prove its case. It did so nevertheless. The probative value of this evidence was substantially outweighed by its prejudicial effect, and therefore it was not admissible. KRE 403. Trial counsel should have objected to its introduction, but improperly failed to do so.

Any doubt as to whether or not trial counsel should have objected to the introduction of this evidence on KRE 403 grounds has been clearly settled in the case of Majors v. Com. 177 S.W.3d 700 (Ky. 2005), where this Court held that "weapons, which have no relation to the crime, are inadmissible." Id. at 710 (*citing* Gerlaugh v. Commonwealth, 156 S.W.3d 747 (Ky.2005)). The Court further added, "[t]hus, it was error to introduce these weapons without connection to the crime." Id. at 711. Although the decision in Majors was rendered after the trial in the current case, it nonetheless bolsters the position that C.J.'s counsel improperly failed to object to the admission of the additional firearms in C.J.'s trial case. They were as inadmissible under KRE 403 grounds in 2000, when C.J.'s trial occurred, as they were in 2005 when Majors was decided. The Majors case simply underscored and clarified an already-existing truth: additional firearms with no connection to the underlying crime are inadmissible at trial.

KRE 403 is a basic law of evidence. Trial counsel cannot claim ignorance of so basic a legal principle. Nor can it be argued that the failure to object was the result of "trial strategy." There can be no justifiable strategy in failing to object to evidence that is clearly prejudicial to one's client and the client's case. Even without the aid of Majors, any trial counsel should have known to object to the introduction of Christopher McGorman Sr.'s gun collection into evidence.

The Circuit Court, however, *did* have the benefit of Majors to aid it in its decision. Yet the court still found that "defendant was not prejudiced by the introduction of the guns." Appendix 2, pg. 17; T.R. PC Vol. III, 405. To justify this finding, the court expressed its belief that the guns were presented as part of a larger body of evidence and exhibits that were "introduced collectively to establish the culture in which the defendant was living at the time, as well as his interest in and access to such items." Id. at 17.

However, only a paragraph later, the court says C.J. was not prejudiced by the introduction of the guns, in part due to the fact that the jury heard testimony that C.J. *did not* have a key to his father's gun cabinet, and "had to ask his parents for the key to gain access." Id. (emphasis added). The court listed a few other testimonial factors as well, such as the gun cabinet being only recently moved into C.J.'s room and the fact that "none of [the additional guns] were used during the commission of the crime at issue. Id. The court additionally noted, "[t]he introduction of the seven guns was inconsequential when considering the totality of evidence introduced at trial." Id.

Yet, if the introduction of the guns into evidence was *not* prejudicial, due to testimony that established that C.J. did not normally have access to these guns, then the argument raised earlier that the guns were relevant to show his access to the guns must

fail. Put simply, the evidence is either relevant, or it is irrelevant. It cannot be both. If the introduction of these additional guns constituted irrelevant evidence, then it should have been absolutely excluded under KRE 402 (which states in part, "[e]vidence which is not relevant is not admissible). If on the other hand, the introduction of the guns is deemed to be relevant, such evidence is then subject to a KRE 403 analysis.

A properly applied KRE 403 analysis, further aided by Majors, can yield only one conclusion: the additional guns should not have been admitted into evidence. The Circuit Court actually notes that "none of them [the additional guns] were used during the commission of the crimes at issue." Id. at 17. Therefore, under Majors, they were *clearly* inadmissible, as "weapons without connection to the crime." Majors, at 711. Counsel was ineffective for his failure to object to the introduction of these additional firearms.

The Circuit Court's finding that C.J. "had not met his burden of showing that there is a reasonable probability that the result of the proceeding would have been different, but for defense counsel's failure to object to the introduction of the guns[,]" Appendix 2, pg. 18; T.R. PC Vol. III, 406, is incorrect. The introduction of additional unrelated firearms is a powerful visual exhibit that can have a profound impact on members of a jury. In the Majors case specifically, the court found that the improper introduction of firearms not related to the crime, along with other error in the case created a "cumulative effect" of prejudice that "mandate[d] a new trial." Id. at 712 (*citing* Funk v. Commonwealth, 842 S.W.2d 476, 483 (Ky.1993)).

C. McGorman Was Denied Effective Assistance of Counsel When Counsel Failed to Object to Improper Statements in the Prosecutor's Closing Argument

In the Commonwealth's closing argument he urged that, "these same doctors [the defense psychologist and psychiatrist] say he [C.J.] is getting better, does that not scare

you folks." V.R. 8/8/01, 11:15. "These doctors will decide when he gets out." Id. A wealth of evidence had been offered at trial that C.J. was insane. The jury even sent a question from their deliberations inquiring what the sentences were for guilty but mentally ill and guilty but insane, T.R Vol. III, 323, and whether C.J. would receive "mental help" if found guilty. T.R. Vol. III, 324. Clearly, the probability of prejudice from the prosecutor's improper statements existed, yet trial counsel failed to take the initiative to protect the record or advocate for his client at this critical juncture.

The Circuit Court found:

> these statements did not prejudice the defendant. It appears the statements were made to illustrate that under the insanity instruction, the treating doctors had the authority to determine the extent, and more importantly, the duration of any treatment, and therefore, if found not guilty by reason of insanity, the defendant would not necessarily be hospitalized on a permanent basis, nor would the treatment necessarily have to occur in a hospital setting.

Appendix 1, pg. 19; T.R. PC Vol. III, 407.

The prosecutor functions as the government's representative "whose obligation to govern impartially is as compelling as its obligation to govern at all. . . ." Berger v. United States, 295 U.S. 78, 88 (1935). The duty of the prosecutor is to seek justice, not merely to convict. ABA Standards for Criminal Justice § 3-1.1(a). The misconduct of the prosecutor can "render the trial fundamentally unfair." United States v. Chambers, 944 F.2d 1253, 1272 (6th Cir. 1991).

A defendant is entitled to relief if the prosecutorial misconduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974); Macias v. Makowski, 291 F.3d 447, 451 (6th Cir. 2002). Improper statements are considered cumulatively. United States

v. Young, 470 U.S. 1, 11 (1985); United States v. Francis, 170 F.3d 546, 548 (6th Cir. 1999) (reversing on cumulative effect of prosecutorial statements); see also, Bates v. Bell, 402 F.3d 635, 641 (6th Cir. 2005). Improper closing arguments are particularly damaging because jurors believe the prosecutor will observe his obligation to seek justice and because such statements "carry much weight." Berger, 295 U.S. at 88.

Prosecutors have a duty to "refrain from improper methods calculated to produce a wrongful conviction" or unjust sentence and ensure that defendants receive a fair trial. See Berger, 295 U.S. at 88. Indeed, a prosecutor is not at liberty to strike foul blows. Id. The Sixth Circuit adopted a "long accepted standard" requiring prosecutors to be "the representative not of an ordinary party to a controversy, but of a sovereignty...whose interest therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." Sizemore v. Fletcher, 921 F.2d 667, 671 (6th Cir. 1990) (*quoting* Berger, 295 U.S. at 88). The prosecutor ignored this duty in C.J.'s case.

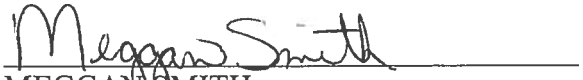
In his position as an advocate for the Commonwealth the prosecutor wields great power. Here, his sway and appeal to emotion was so powerful that it overruled the obvious nature of C.J.'s youth and mental illness. C.J.'s counsel was deficient in failing to object to any or all of the prosecutor's improper statements and there is a reasonable probability that the result of C.J.'s trial would have been different if the prosecutor's improper arguments were not put before the jury.

CONCLUSION

For the foregoing reasons, McGorman asks this Court to affirm the Court of Appeals opinion Reversing and Remanding his case for a new trial and for an evidentiary hearing on the issue of the plea offer. In the alternative, McGorman asks this Court to

remand for a new trial or evidentiary hearing on any or all of the issues denied by the Court of Appeals.

Respectfully submitted,



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